रजिस्टर्ड नं० एल०-33/एस०-एम० 13-14/98.

राजपत्र, हिमाचल प्रदेश

(असाधारण)

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, बुधवार, 23 सितम्बर, 1998/1 आश्विन, 1920

हिमाचल प्रदेश सरकार

निर्वाचन विभाग

अधिसूचना

शिमला-171002, 4 सितम्बर, 1998

संख्या 3-33/98-ई० एल० एन०.—भारत निर्वाचन आयोग की अधिसूचना संख्या 82/हि० प्र०-वि० स०/1/98, दिनांक 19 अगस्त, 1998 तदानुसार 28 श्रावण, 1920 (शक), अंग्रेजी रूपान्तर सहित, जिसमें हिमाचल प्रदेश उच्च न्यायालय, शिमला, का निर्वाचन अर्जी संख्या 1 वर्ष 1998 का निर्णय निहित है, को जनसाधारण की सूचना हेतु प्रकाशित किया जाता है ।

आदेश से,

परमिन्दर माथुर,
मुख्य निर्वाचन अधिकारी,
हिमाचल प्रदेश ।

3203-राजपत्र/98-23-9-98—1,360. (3437) मूल्य : 1 रुपया ।

भारत निर्वाचन आयोग

निर्वाचन सदन,
अशोक रोड,
नई दिल्ली-110001.

अधिसूचना

दिनांक 19 अगस्त, 1998
28 श्रावण, 1920 (शक्)

संख्या 82/हि0 प्र0-वि0 स0/1/98.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में, निर्वाचन आयोग 1998 की निर्वाचन अर्जी संख्या 1 में शिमला स्थित हिमाचल प्रदेश उच्च न्यायालय के तारीख 24 जून, 1998 के निणय को एतद्द्वारा प्रकाशित करता है ।

आदेश से,

के0 आर0 प्रसाद,
सचिव,
भारत निर्वाचन आयोग ।

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashoka Road,
New Delhi-110001.

Dated the 19*th August*, 1998.
28 *Shravana*, 1920 (*SAKA*).

NOTIFICATION

No. 82 HP-LA/1/98.—In pursuance of Section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes Judgement dated 24th June, 1998 of the High Court of Himachal Pradesh at Shimla in Elecion Peittion No. 1 of 1998.

By order,
K. R. PRASAD
Secretary,
Election Commission of India.

R. L. KHURANA, J.

By virtue of the present petition preferred under sections 80 and 81 read with sections 100 and 101 of the Representation of Peoples Act, 1951 (for short, 'the Act') the petitioner, Mehendra Pal has called in question the election of respondent No. 1 Shri Ram Dass Malanger, the returned

candidate from 33—Kutlehar Assembly Constituency to the Himachal Pradesh Vidhan Sabha in the election held on 28-2-1998. It has been prayed as under :—

(*i*) Recount of ballot papers ;

(*ii*) Inspection of postal, tendered and rejected votes ;

(*iii*) Setting aside the election of respondent No. 1 and declaring the same as void ;

(*iv*) Petitioner be declared elected from 33—Kutlehar Assembly Constituency to the Himachal Pradesh Assembly ;

(*v*) Restraining respondent No. 1 from exercising his right to vote in the Assembly during the pendency of the present petition ;

(*vi*) Award of costs of the petition in favour of the petitioner ; and

(*vii*) Such further and necessary orders to be passed which may be deemed fit, just and proper on the facts and in the circumstanese of the case.

The elections to the 9th Himachal Pradesh Legislative Assembly (Vidhan Sabha) were held on 28-2-1998. The petitioner and respondents No. 1 to 7 contested such elections from 33—Kutlehar Assembly Constituency. The petitioner was a congress candidate, while respondent No. 1 was a candidate of Bhartiya Janta Party. Respondents 2 to 7 were either independent candidates or belonging to other political parties. The counting of votes was held at Una on 3-3-1998. The petitioner secured 11,657 votes as against 11660 votes polled by respondent No. 1. Consequently respondent No. 1 was declared elected by a margin of only three votes.

It may not be out of place to mention here that alongwith elcetions to the State Assembly., elections for three seats of Twelfth Lok Sabha from Himachal Pradesh were also held. These three seats included the Hamirpur Parliamenatry Constituency. 33—Kutlear Assembly Constituency formed a segment of Hamirpur Parliamentary Constituency. The counting of Kutlehar Assembly segment of Hamirpur Parliamentary Consittuency was also undertaken at Una alongwith the counting of Kutlehar Assembly Constituency. For the purpose of counting twelve tables were laid, that is, six for Hamirpur Parliamenatry Constituency as and six for Kutlehar Assembly Constituency. The tables in respect of two constituencies were placed in two rows parallel to each other with a distance of about six feets between the two rows. The separate table for the Returning Officer was on one side of the room on a dais. The petitioner had appointed six counting agents, that is, one counting agent for each of the six tables meant for counting votes in respect of the Kutlehar Assembly Constituency.

While assailing the electoion of respondent No. 1 and in making out a case for the recounting of votes, the petitioner has averred in paras 10 to 13 of his petition, as follows:—

"10. That the counting staff after opening the ballot boxes on the tables, took out and separated the ballot papers for the Assembly Constituency as well as for the parliamentary Constituency. After separating the votes, the votes taken out from each ballot box were counted without determining the same candidate wise. Then the number of the ballots taken out were entered in Form 20-A under Rules 56-b (7) of the Conduct of Election Rules 1961. As per the form 20-A, certified copy of which is added here with as Annexure P/2, the total number of ballot papers polled from all the polling stations of the Assembly Constituency were shown as 35,310, while the vote sactually counted from all these polling station were shown as 35,318, which is evident from the statement Round-wise detailed result of counting, a certified copy of which is added as Annexure P/3. Thus 8 votes more were counted than actully taken out from the ballot boxes for the Kutlehar Assembly Constituency. This cannot happen in any circumstances unless there is irregularity in the counting and this difference of votess clearly shows that the counting was not properly done and has materially

affected the election of the respondent No. 1. These irregularities and illegalities were committed during the counting in favour of the respondent No. 1 by the members of the counting staff.

11. That Shri R. S. Sharma was the Returning Officer of 33—Kutlehar Assembly Constituency. The counting was completed in six rounds and a number of irregularities and illegalities were committed during the counting of votes on various tables of the Assembly Constituency. Further the votes of the petitioner were mixed in the bundles of Respondent No. 1 and many votes polled in favour of the petitioner were illegally rejected. Further the votes polled, which were required to be rejected were counted in favour of the respondent No. 1. The counting for the first two rounds were held almost correctly but thereafter the Returning Officer and the other members of the counting staff started showing the partial attitude towards the petitioner as the result of all the Assembly Constituencies in the Himachal Pradesh had been declared and trend of the voting and results at the national level for the Parliamentary Constituencies had also statrted becoming available, further the result of this Assembly Constituency would have affected the formation of the State Government. The details of the irregularities and illegalities committed during the counting in various rounds is given as under :

(*i*) That on table No. 1 Shri Budhishwar Pal, r/o VPO Raipur Maidan, Tehsil Bangana was the counting agent of the petitioner. He attended the counting from the very beginning till its completion. As per the procedure adopted after each round of counting, the doubtful votes were brought to the table of the Returning Officer from all the 6 tables of the Assembly Constituency and at the end of each round, the Returning Officer used to decide the votes on each table in each round to be accepted/rejected.

From table No. 1 about 2-3 ballot papers of the petitioner in each round were rejected by the Returning Officer on the ground that they were having the identification marks. These votes related to round No. 3—6. In fact these votes were having only a slight smug of ink due to the handling of the ballot papers by the electors. Further there were about 40 votes in rounds No. 3 to 6 which were duly stamped in favour of the petitioner were rejected on the ground that these were partially stamped in the favour of the petitioner. In fact these votes were clearly marked in favour of the petitioner and one margin of the impression of seal had slightly touched the symbol of the other candidate.

Further the Returning Officer has wrongly accepted the 5-6 ballot papers in each round from Round No. 3—6 in favour of respondent No. 1 which was liable to be rejected due to double marking. A few in favour of the respondent No. 1 and other in favour of the other candidates.

Further on Table No. 1, the Members of the Counting Staff mixed about 4-5 ballot papers polled in favour of the petitioner in the bundles of the Respondent No.1 and other candidates in each round. About 20 votes of the petitioner were mixed in the bundles of Ram Dass Malanger i. e. Respondent No. 1 and other candidates in rounds No. 3—6. Whenever the objections were raised by the Counting Agent of the petitioner in this regard and asked for the showing of the ballot papers the counting staff showed only one ballot paper. The Counting Staff used to put these votes of the petitioner in between the bundles of Respondent No. 1 and other candidates and counted in their favour. Thus the petitioner was duped of the double number of the votes mixed in the bundle of respondent No. 1 and other candidates.

Another irregularity committed by the members of the counting staff on this table was that they put 23 to 24 votes of the respondent No. 1 and treated it as the bundles consisting of 25 votes in favour of respondent No. 1 thus in the bundles of 25 votes of the respondent 3 to 4 votes in each bundle were less. In this way, the members of the counting staff increased the votes of respondent No. 1. Similarly in the bundles of the petitioner, the members of the counting staff put 27-28 votes and treated them as a bundle of 25 votes, thus this decreased the votes of the petitioner by 2 to 3 votes in each bundle. A pertinent objection against this was raised by the counting agents of the petitioner but the same was arbitrarily ignored. This irregularity has also materially affected the election of the respondent No.1.

(*ii*) That on table No. 2 Mrs. Urmila Sharma, r/o Vill. Alsan, P.O. Bhiambi, Tehsil Bangana was the counting agent of the petitioner. On this table also about 20 votes in rounds No. 3—6 which were polled in favour of the petitioner and were slightly smugged due to the mishandling of the ballot papers were illegally rejected treating it an identification mark. These votes were required to be counted in favour of the petitioner. Futher on this table about 7-8 votes in each round were mixed with the bundles of the respondents during rounds number 3 to 6.

(*iii*) That on table No. 3 Shri Dev Raj Sharma (Retired Capt.) r/o Vill. Piplu, P.O. Ghaloun, Tehsil Bangana, was the counting agent of the petitioner. On this table about 5-6 votes in each round were mixed in the bundles of respondent No. 1 and other acndidates during round number 4—6. There were about 4-5 votes in each round which could not be ascertained in whose favour these votes were polled and were liable to be rejected were counted in favour of the respondent No.1 by the counting staff at the table.

(*iv*) That on table No. 4 Shri Surender Prahar, VPO Baroh, Tehsil & Distt. Una, was the counting agent of the petitioner. Further that there are also number of ballot papars having the stamp on back side of the symbol of respondent No. 1 but no stamp was on the front side where the symbols and the names were printed and the counting agent of the petitioner had made request to treat these votes as rejected votes and send the same to the Returning Officer for decision. But the counting staff was adament and they were mixing these votes in the bundles of the respondent No. 1 and treating these votes polled in favour of respondent No. 1. There are about 8—10 such votes in each round which were liable to be rejected were counted in favour of Respondent No. 1. On this table 4—6 votes of the petitioner in each round were mixed in the bundle of respondent No. 1 during 3—6 round.

Further on this table about 3-4 votes of the petitioner in each round were rejected though they were stamped in favour of the petitioner but due to wrong folding of the ballot, the impression of the seal of the stamp slightly appeared in the column of other candidates.

Each time when the counting agents raised objections to the counting staff, they used to threaten them to keep quite and watch the counting and that they were not mixing the votes and were counting them correctly, and if the counting agent would still insist they would be thrown out of the counting hall.

Another irregularity committed by the members of the counting staff on this table was that they put 23 to 24 votes of the respondent No. 1 and treated it as the bundle consisting of 25 votes in favour of the respondent No. 1, thus in the bundle

of 25 votes of the respondent only 3 to 4 votes in each bundle were less. In this way, the members of the counting staff increased the vote of respondent No. 1. Similarly in the bundle of the petitioner, the members of the counting staff put 27-28 votes and treated them as a bundle of 25 votes thus this decreased the votes of the petitioner by 2 to 3 votes in each bundle. This, irregularity has also materially affected the election of the respondent No. 1.

(v) Further on table No. 5 Ram Pal Saini VPO, Dangehra, Tehsil & Distt. Una was the counting agent of the petitioner and he attended the counting on that table throughout the counting. The Returning Officer had wrongly accepted the votes of respondent No. 1 which were carrying double stamps and those which were having impression of the stamp in between the lines of the symbols of the Respondent No. 1 and another candidate and it could not be ascertained whether the votes were polled in favour of Respondent No. 1 or other candidate. But these votes were treated as the votes polled in favour of the respondent No. 1 and were counted in his favour. The Returning Officer has accepted 15—20 votes in 3-4 rounds and about 20 votes in 5-6 rounds in favour of the respondent No. 1 though these votes were liable to be rejected.

Further on this table the counting staff had auoided to show the ballot papers to Shri Ram Pal Saini, VPO Dangehra, Tehsil & Distt. Una the counting agent of the petitioner inspite of the repeated objections raised by him. The ballot papers were shown at two times and on one occasion 4 ballot papers of the petitioner were found in the bundle of Respondent No. 1 and the same were taken out from the bundle of respondent No. 1 which were being counted at that time. The counting agent of the petitioner raised other objections but the counting staff did not listen to the requests of the counting agent of tne petitioner to show him the ballot papers and told him that if he would insist to see the ballot paper it would cause disturbance to the coutning staff and he would be turned out and further counting staff stated that they were tired and wanted to finish the counting as early as possible. On this the counting agent had no alternative but to remain a silent spectator.

(vi) On table No. 6, Shri Krishan Chand Sharma, VPO Badsala, Tehsil & Distt. Una was the counting agent of the petitioner. The counting agent of the petitioner on Table No. 6 raised an objection that some of the votes were stamped against none of the names and symbols of the candidates. On this table, from round number 4 to 6 the Returning Officer had wrongly rejected in eacn round about 8 votes of the petitioner which were clearly polled in favour of the petitioner. The votes were rejected on the ground that it had been double marked, two times in the column of the petitioner. Further Returning Officer had counted 20 votes in each round in favour of the respondent No. 1 which were having the identification marks either of thumb impression or signature in the column of the Respondent No. 1 instead of having seal of official stamp. The members of counting staff had also mixed total 20 to 30 votes of the petitioner in the bundles of respondent No. 1 and other candidates from rounds number 4—6. Though the video film was being made but the main focus was placed on the tables of the Parliamentary Constitutency. The petitioner had objected and requested the Returning Officer to also filmise that of the Assembly Constituency so that if any irregularity is there that could be caught and later on rectified but the Returning Officer did not listen to this. Even he had stopped to take the movie when the crowd was present there after 5.00 P.M. and after the completion of the counting of Parliamentary constituency, the counting staff of the Parliamentary Constituency was interfering in the counting process

Further the rejection and acceptance of ballot papers after each round was not filmised.

(*vii*) The above submissions clearly prove that a large number of votes polled in favour of petitioner have been wrongly and illegally rejected. Thus apart from recount, inspection of such rejected votes deserves to be allowed to the petitioner.

12. That the petitioner got majority of votes from the ballot papers taken out from the ballot boxes of all the polling booths despite various irregularities committed during the counting in favour of Respondent No. 1 and against the petitioner. The petitioner was said to have polled 11,657 votes while the respondent No. 1 was said to have polled 11,660 votes which were taken out from the ballot boxes. Total 160 postal ballot papers were counted. Out of them 30 were decalred as invalid and 20 were said to have been polled in favour of the petitioner while other 94 ballot papers were said to have been polled in favour of the respondent No. 1. Approximately 15 to 20 declarations of the postal ballot papers were not duly signed/attested by the competent authority. 4 or 5 such postal ballot papers were not found in cover. Thus these ballot papers were liable to be rejected but the Returning Officer has counted the same in favour of the respondent No. 1. Besides about 20-30 postal ballot papers were received at the time when the counting was in progress, *i.e.* after 28-02-1998, thus these ballot papers could not have been counted and were liable to be rejected. But all these postal ballot papers which were received during the counting were counted in favour of respondent No. 1 and in violation of rules and the instructions issued by the Election Commission of India. Thus the election of the Respondent No. 1 has been materially affected due to the counting of the postal ballot papers which were liable to be rejected. In view of above, apart from summoning and recounting these postal ballots, their inspection may also be granted to the petitioner.

13. That a perusal of form 20-A (Annexure P/2) clearly indicates that the total number of votes found in the Ballot boxes of 82 Polling Stations pertaining to this Constituency were 35310 whereas a perusal of statement of Roundwise detailed result of counting in 33-Kutlehar Assembly Constituency (copy of which is added herewith as Annexure P/3) indicates that the total number of valid and rejected votes counted for the purpose of declaring the result were 35318. The above contempo raneous record/evidende clearly indicates that there is an increase of 8 votes at the time of counting. In other words 8 more votes were counted when in fact these votes were never cast/polled at any of the Polling Stations. These 8 un-accounted for votes which have been counted in favour of respondent No. 1 have matterially affected the election and the election result of respondent No. 1 as the difference of margin of victory is only of 3 votes. These excess votes were counted by the counting staff simply to help him in advancing his Election prospects when in fact these were fake votes. The submission made in this para go to the very root of the entire matter and render the election of respondent No. 1 void. In other words the election result of respondent No. 1 has therefore materially been effected."

Respondents 2 to 7 though were duly served, failed to appear. They were, therefore, ordered to be proceeded aginst *ex parte*.

Respondent No. 1, while resisting the petition has denied the averments made in the petition with regard to the irregularities alleged to have been committed by the counting staff. It was averred that the election petition lacks in material facts and particulars and it does not furnish a cause of action. Further objection raised are to the effect that the petition has not been properly verified and that a true copy of the petition has not been supplied to him.

On the basis of pleadings of the parties, following preliminary issues were framed on 14-5-1998:—

1. Whether the election petition lacks in material facts and particulars and does not furnish a cause of action, as alleged , if so to what effect ? OPR.

2. Whether the election petition has not been properly verified , if so to what effect ? OPR.

3. Whether true copy of the election petition has not been supplied to the respondents, if so to what effect ? OPR.

4. Relief .

The parties chose not to lead any evidence in support of the above issues.

I have heard the learned counsel for the parties and have also gone through the record of the case. My findings on the above issues are as under:—

Issues No. 2 and 3:

During the course of hearing , Shri Satya Pal Jain, Advocate, the learned counsel for respondent No. 1 did not press these issues. Consequently, both the issues are decided against respondent No. 1.

Issue No. 1.

The learned counsel for the respondent No. 1 has contended that the petition merits dismissal at the preliminary stage since the same does not disclose any enforceable cause of action inasmuch as the petitioner has failed to plead all the necessary facts and material particulars justifying the recounting of votes.

The learned counsel for the petitioner, on the other hand, has contended that the petition does not lack in material facts and particulars. The pleadings set out do make out a *prima facie* case and an enforceable cause of action.

The relevant pleadings as contained in paras 10 to 13 of the petition have already been reproduced above. The submissions made by the counsel for the parties under the present issue, therefore, have to be appreciated in the light of such pleadings.

In order to appreciate the rival contentions of the learned counsel for the parties, it would be expedient to make a reference to the various provisions of the Act and the Conduct of Election Rules, 1961, hereinafter referred to as the Rules.

Section 80 of the Act provides that an election shall be called in question only by an election petition presented in accordance with the provisions contained in Chapter-II of the Act. Section 80-A vests the jurisdiction to try an election petition in the High Court.

Section 81 which deals with presentation of election petitions, provides:—

> "81. *Presentation of Petitions.*—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than the date of election of the returned candidate or if there are more than one returned candidate at the election and dates of their election are different, the later of those two dates.

Explanation.— In this sub-section, 'elector' means a person who has entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) Deleted.

(3) Every election petition shall be accompained by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

Section 82 provides for the parties, who are essentially to be joined, in an election petition. Section 83 deals with the "contents of petition", it reads:—

"83. *Contents of petition.*—(1) An election petition—

(*a*) shall contain a concise statement of the material facts on which the petitioner relies ;

(*b*) shall set forth full particulars of any corrupt practice that the petitioner alleged including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice ; and

(*c*) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings ;

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

Section 100 of the Act lays down the grounds for declaring an election to be void. The said section, in so far as it is material for the purpose of present case, reads:—

"(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

(*a*).....; or

(*b*) .....; or

(*c*) .....; or

(*d*) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(*i*) .....; or

(*ii*) .....; or

(*iii*) by the improper reception, refusal of rejection of any vote or the reception of any vote which is void ; or

(*iv*) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

(2) ....."

Section 101 provides for the grounds for which a candidate other than the returned candidate may be declared to have been elected, in the following terms:—

"101. *Grounds for which a candidate other than the returned candidate may be declared to have been elected.*— If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

(*a*) that in fact the petitioner or such other candidate received a majority of the valid votes ; or

(*b*) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes.

the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

Section 117 of the Act provides for the deposit of the security amount of Rs. 2000/- for the costs of the petition in accordance with the Rules of the High Court, at the time of presentation of the election petition.

Section 86(1) of the Act lays down that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the Act.

Part V of the Rules deals with the counting of votes in Parliamentary and Assembly Constituencies. By virtue of rule 51, the Returning Officer, at least one week before the date, is required to appoint the place(s) where the counting of votes is to be done indicating the date and time at which the counting is to commence. Under Rule 52 a candidate is entitled to appoint counting agents not exceeding sixteen at the place or each of the places, fixed for counting under rule 57. The returning Officer under rule 53 is empowered to exclude from the place(s) fixed for counting of votes all persons except the persons detained in clauses (*a*) to (*d*) of the said rule. Rule 54 casts a duty on the Returning Officer to read out the provisions of Section 128 to the persons present at the place(s) fixed for counting before the commencement of the counting , in order to ensure maintenance of secrecy of voting.

Ballot papers received by post are required to be dealt with by the Returning Officer first by virtue of R. 54(A), which contains details of the procedure to be followed for accepting or rejecting and counting the votes cast by postal ballot. After complying with the necessary formality all postal ballots and rejected ballots are required to be separately bundled and kept together in a packet, which is to be sealed with the seal of the Returning Officer and of such candidates, their election agents and counting agents as may desire to fix their seal thereon. After dealing with the postal ballots, the Returning Officer by virtue of Rule 55 is required to have the ballot boxes, used in various polling stations, opened and to have the ballot papers, found in such boxes, counted simultaneously. Counting agents present at the table are allowed to inspect the paper seal or other such seals as might have been affixed thereupon. Rule 56 casts a duty upon the Returning Officer to have the ballot papers, taken out of each ballot box, arranged in convenient bundles and scrutinized. Ballot papers, as provided in sub-rule (2) of Rule 56 may be rejected, if any of the defects stated in sub-clauses (*a*) to (*h*) is noticed. Sub-rule (3) thereof enjoins a duty on the Returning Officer to allow each counting agent present a reasonable opportunity to inspect the ballot paper, before rejecting the same under sub-rule (2). After rejecting a ballot paper, the Returning Officer is required to make an endorsement on each ballot paper with the word 'rejected' alongwith ground of rejection in abbreviated form. All

rejected ballot papers are then to be bundled together. Such of the ballot papers which have not been rejected are thereafter to be counted. After the counting is completed the counting supervisor is obliged to prepare the result of counting by filling and signing Part-II in form 16, which ultimately is required to be signed by the Returning Officer. Clause (*b*) of sub-rule(7) of Rule 56 says that the Returning Officer shall then make the entry in a result sheet in form 20 and announce the particulars.

Counting as per Rule 60 has to be continuous. Rule 63 says that after the completion of the counting, the Returning Officer shall record the result in form 20 about the total number of votes polled by each candidate and announce the same. After such announcement, the candidate or in his absence, his election agent or any of his counting agents is entitled to apply in writing, as is envisaged under sub-rule (2) thereof to the Returning Officer for a recount of the votes, either wholly or in part stating the ground on which demand for recount is made. On such an application have been made, the Returning Officer is required to decide the same by recording his decision with reasons thereof. In case a recount is ordered, either wholly or in part, same procedure is to be followed for recounting the votes, as is required to be followed for counting the votes. On recount, result sheet in form 20 is required to be amended and amendments so made are again required to be announced by the Returning Officer. Sub-rule (6) of Rule 63 provides that after the total number of votes polled by each candidate has been announced, the Returning Officer shall complete and sign the result sheet whereafter no application for recount shall be entertained. This is subject to a proviso that no steps, to announce the result of counting is to be taken, until the candidate and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right to have a recount conferred by sub-rule (2).

If ballot papers are counted at more places than one, the same procedure shall apply to the counting at each place as regards counting of votes but rule 54 (A) pertaining to postal ballot, rule 63 relating to recount of votes and rule 64 pertaining to declaration of the result of election is to apply only to the counting at the last of such places.

On completion of aforementionrd process, result is to be declared in an appropriate form, as per the requirement of Rule 64, declaring the candidate to whom the largest votes have been given.

In the light of the above mentioned provisions of the Act and the Rules, the learned counsel for the respondent No. 1 has raised the following points:—

(*a*) Petition does not give material facts ;
(*b*) Figures given are vague ;
(*c*) There is no assertion that the result has been materially affected ; and
(*d*) a rowing and fishing enquiry is being sought by the petitioner.

Section 83 (1) (*a*) of the Act requires a concise statement of material facts on which the petitioner relies. This sub-section correspondes to Order 6 rule 2 of the Code of Civil Procedure. In order to constitute cause of action in favour of the petitioner all the material facts, that is, the basic and primary facts, which the petitioner is bound under the law to substantiate before he can succeed, have to be pleaded. In other words, all the facts necessary to formulate a complete cause of action have to be pleaded . The omission of a single fact leads to incomplete cause of action.

Clause (*b*) of section 83(1) of the Act enjoins a duty on the petitioner to set forth full particulars of any corrupt practice that the alleges, including as full a statement as possible of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice.

The Supreme Court in *Udhav Singh* v. *Madhav Rao Scindia* (AIR 1976 SC 744) while pointing out the distinction between "material facts" and "material particulars" has held :

> "The distinction between 'material facts' and 'materiaial particulars' is important because different consequences may follow from a deficiency of such facts or particulars in the pleadings. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. If the petition is passed solely on these allegations which suffer from lack of material facts the petition is liable to be summarily rejected for want of a cause of action. In the case of a petition suffering from a deficiency of material particulars the Court has a discretion to allow the petitioner to supply the required particulars even after the expiry of limitation."

It was further held that all the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence are "material facts". Whether in an election petition a particular fact is material or not, and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts, which are essential to clothe the petitioner with a complete cause of action, are "material facts", which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83(1)(*a*).

Dealing with "particulars", the Hon'ble Supreme Court held:—

> "particulars, on the other hand, are 'the details of the case set up by the party'. 'Material particulars' within the contemplation of clause (*b*) of section 83(1) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of c ause (*a*) 'Particulars' serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative."

The Rajasthan High Court in *Mohaammad Yusuf and another* v. *Bhairon Singh Shekhawat* (AIR 1995 Rajasthan 239), while explaining the expression "material facts" has pointed out the differen ce between the expression "material facts" and "full. particulars" in the following terms:—

> "The material facts mean (*a*) facts necessary to formulate a complete cause of action, (*b*) all the preliminary facts which must be proved by the party toestablish a cause of, action, (*c*) the basic facts which constitute ingredients of particular corrupt practice. (*d*) all the facts which are essential to clothe the petitioner with complete cause of action, (*e*) the facts which if established would give the petitioner the relief asked fo1, (*f*) the facts on the basis of which the court could give a direct verdict in favour of the election petitioner in case the returned candidate did not appear to oppose the petition. (*g*) facts which if not proved, the petition must fail.
>
> A 'reasonable cause of action' is said to mean a cause of action wi h some chances of success when only the allegations in the pleadings are considered. So long as the claim discloses some cause of action or raises some questions, the mere fact that the case is weak and not likely to succeed is no ground for striking it out.
>
> There is a difference between the material facts' and 'particulars'. The function o f particulars is to present as full a picture of a cause of action with such information in details as to make the opposite party understand the case he will have

to meet. There may be some overlapping between 'material facts' and 'particulars' but the two are quite distinct. The distinction is one of degree. The 'material facts' are those which the party relies upon and which if it does not prove, he fails."

The requirements of section 83 of the Act are mandatory. [See : *Samant N. Balakrishna etc.* v. *Geogre Ferandez and others* (AIR 1969 SC 1201)]. While so holding the Hon'ble Supreme Court has further observed :—

"First section 83 of the Act is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. Second, omisson of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. Third, the function of particulars is to present in full a picture of the cause of action to make the opposite party undertsand the case he will have to meet. Fourth, material facts and particulars are distinct matters. Material facts will mention statements of fact and particulars will set out the names of persons with the date, time and place. Fifth, material facts will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present full a pitcure of the cause of action. Sixth, in stating the material facts, it will not do merely to quote the words of the section because then the efficacy of the material facts will be lost. The fact which constitutes a corrupt practice, must be stated and the fact must be correlated to one of the heads of corrupt practice. Seventh, an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the obtaining or procuring of assistance unless the exact type and form of assistance and the person from whom it is sought and the manner in which the assistance is to further the propsects of the election are alleged as statements of facts."

It was further observed that :

"Section 83 requires that the petition must contain a concise statement of the material facts on which the petitioner relies and the fullest possible particulars of the corrupt practice alleged. 'Material facts' and 'particulars' may overlap but the word 'material' shows that the grounds of corrupt practice and the facts necessary to formulate a complete cause of action must be stated. The function of the particulars is to present as full a picture of the cause of action to make opposite party understand the case he will have to meet.....facts stated in the petition relating to any corrupt practice must be sufficient to constitute a cause of action. In other words the fact must bring out all the ingredients of the corrupt practice alleged. If the facts stated fail to satisfy that requirement then they do not give rise to a triable issue. Such a defect cannot be cured by any amendment after the period of limitation for filing the election petition."

The basic question involved under the present issue is— whether a case for recount is made out on the basis of the averments made in para 10 to 13 of the petition ?

In paras 10 and 13 of the petition, the averments made are to the effect that after separating the ballot papers for Assembly Constituency and Parliamentary Constituency, the votes taken out from each box were counted, without determining the same candidate-wise and thereafter such ballots were entered in the prescribed Form 20-A, as required under Rule 56-A(7) of the Rules. The total number of votes polled at all the polling stations of the Assembly Constituency were shown as 35,310 while the votes actually counted were found to be 35,318. Thus, eight more votes were counted than actually taken out from

the allot-boxes, which fact goes to show that counting was not properly done and that irregularities and illegalities were commi:ed during the counting which has materially affected the election of the respondent No. 1.

It is significant to note that there are no averments as to how man votes were issued to the voters at all the polling stations by the Presiding Officers nor the statements in Form— 16 in respect of each of such polling stations have been placed on record. In order to obtain recount of votes on this ground a proper foundation was required to be laid by the petitioner indicating the precise material on the basis of which it could be urged by him with some substance that there has been either improper reception of invalid votes in favour of the returned candidate or improper rejection of valid votes in favour of the defeated candidate or wrong couting of votes in favour of the elected candidate which had infact been cast in favour of the defeated candidate.

Be it stated that it is not the case of the petitioner that such excess eight votes were counted in favour of the respondent No. 1 or that such votes were got mixed in the votes during counting by respondent No. 1 or his counting agent at his behest.

In order to make out a case for recount, the petitioner should have specifically averred the total number of votes issued to the voters, total number of votes polled and counted. No such particulars have been set out in para 10 of the petition. The averments made, therefore, lack in material facts.

Even otherwise the discrepancy is too insignificant which could be safely attributed to accidental slip or clerical or arithmetical mistakes that might have been committed at the time of counting and preparation of the statements in Form 16 and 20-A.

In *D. P. Sharma* v. *The Commissioner and Returning Officer and others* (AIR 1984 SC 654), the number of votes which were taken out and counted from the ballot boxes were in excess to the tune of 316 over and above those which were issued and used by the voters. Such discrepancy was ignored by the Hon'ble Supreme Court and recount was refused by holding that the discrepancy was too insignificant and that such discrepancy could have crept in due to some clerical, accidental or arithmetical mistake during the course of counting and preparation of the requisite statements.

Besides, it may be noticed that there are no averments to show that either the petitioner or his counting agents had stopped participating in the counting process on coming to know of the discrepancy or that any objection in this regard was raised by them. It appears that the petitioner and/or his counting agent(s) continued participating in the counting process with regard to each and every ballot paper which was found and taken out from the ballot boxes.

In para 11 of the petition, the petitioner, while averring that a number of irregularities and illegalities were committed during the process of counting of votes has given instances of such alleged irregularities and illegalities. No grievance has been made in respect of the first two rounds of counting. It has been averred that the counting staff started showing partial attitude towards the petitioner, since during the counting of rounds 3 to 6, result of all the Assembly Constituencies had been declared and the trend of voting and results at the national level for the Parliamentary Constituencies had also started becoming known. The following are the instances of irregularities and illegalities alleged to have been committed by the counting staff during the third to sixth round of counting :

Table No. 1 :

(*i*) Two to three ballot papers, which were in favour of the petitioner, during each round of counting were wrongly rejected by the Returning Officer on the ground that there were identification marks on such ballot papers ;

(*ii*) About 40 votes in rounds No. 3 to 6 which were duly stamped in favour of the petitioner were wrongly rejected on the ground that these were partially stamped in favour of the petitioner ;

(*iii*) Five to six votes in each round from rounds No. 3 to 6, which were liable to be rejected due to double marking, were wrongly accepted in favour of respondent No. 1 ;

(*iv*) Four to five votes polled in favour of the petitioner in each round were mixed by the Counting staff in the bundles of votes in favour of respondent No. 1. In this manner about 20 votes of the petitioner were mixed in the bundles of votes of respondent No. 1 and other candidates ; and

(*v*) The counting staff put 23/24 votes of respondent No. 1 and treated them as bundle of 25 votes, whereas in the case of the petitioner 27/28 votes were treated as a bundle of 25 votes ; which resulted in increase of votes in favour of the respondent No. 1 and decrease in the number of votes in favour of the petitioner.

Table No. 2 :

(*i*) About 20 votes in rounds No. 3 to 6, which were polled in favour of the petitioner and were slightly smugged with ink due to mis-handling of the ballot papers were wrongly rejected by treating it as identification mark ; and

(*ii*) About seven to eight votes in each round, which were in favour of the petitioner, were mixed with the bundles of respondents No. 1 to 7.

Table No. 3 :

(*i*) About five to six votes in each round were mixed in the bundles of respondents No. 1 to 7 during rounds No. 4 to 6; and

(*ii*) About four to five votes in each round, which could not be ascertained as to in whose favour the same were polled and were liable to be rejected, were wrongly accepted and counted in favour of respondent No. 1.

Table No. 4 :

(*i*) A number of ballot papers which bore the stamp on the back side of the election symbol of respondent No. 1 but bore no stamp mark on the front side where symbols and names of the candidates were printed, inspite of objections by the counting agent of the petitioner, were wrongly counted and accepted in favour of respondent No. 1. All such notes were liable to be rejected ;

(*ii*) Four to six notes in each round, which were in favour of the petitioner were mixed in the bundles of respondent No. 1 during counting in rounds No. 3 to 6 ;

(*iii*) About three to four votes in favour of the petitioner in each round were wrongly rejected, since due to wrong folding of the ballots, the impression of the seal had slightly appeared in the column of other candidates ;

(*iv*) The counting staff put 23/24 votes of respondent No. 1 and teratcd them as bundle of 25 votes, whereas in the case of the petitioner 27/28 votes were treated as a bundle of 25 votes, which resulted in increase of votes in favour of the respondent No. 1 and decrease in the number of votes in favour of the petitioner ; and

(*v*) Each time when counting agents of the petitioner raised objections, they were being threatened to keep quiet and that if they insist they would be thrown out of the counting hall.

Table No. 5 :

(*i*) About 15 to 20 votes in rounds No. 3 and 4 about and 20 votes in rounds No. 5 and 6, were wrongly accepted and counted in favour of respondent No. 1, though these bore double marks of the seal and/or the impression of the seal was appearing on the line between the two symbols and it was not possible to ascertain as to in whose favour the same were polled ; and

(*ii*) The counting staff avoided to show the ballot papers to the counting agent of the petitioner inspite of repeated objections. On one occasion four ballot papers of the petitioner were found in the bundle of respondent No. 1.

Table No. 6 :

(*i*) Some of the votes were found not to have been stamped in favour of any of the candidates ;

(*ii*) About eight votes in each round from round Nos. 4 to 6, which were polled in favour of the petitioner, were wrongly rejected ;

(*iii*) About 20 votes in each round, which were liable to be rejected since these were having identification mark, either in the form of thumb impression or in the form of signature, were wrongly accepted and counted in favour of respondent No. 1 ;

(*iv*) About 20 to 30 votes of the petitioner were mixed in the bundles of respondent No. 1 and other candidates , during counting in rounds No. 4 to 6 : and

(*v*) Though video filming of the counting process was being undertaken, the main focus was on the counting of votes for the Hamirpur Parliamentary Constituency. The objections raised by the counting agents of the petitioner were not acceded to. The video filming was even stopped after 5 P.M. on the completion of counting of votes for Hamirpur Parliamentary Constituency.

In all the instances quoted above, as are contained in para 11 of the petition, as regards improper reception or rejection of votes, or reception of votes, which were invalid, it can be noticed that the petitioner has not given the serial number of such ballot papers.

Under the Rules, the petitioner or his counting agent(s) at all the counting centres are supposed to be possessed of ample opportunity to see and examine the ballot papers at the time of scrutiny, rejection and acceptance. In respect of each ballot paper the petitioner or his election agent or his counting agent(s) is in a position to set out precisely the objection(s) for acceptance or rejection of the ballot papers. Therefore, in order to find out the genuineness of the grievance, the serial number of the ballot papers were necessary to be given. In the absence of such information, which the petitioner alone should have known or should be deemed to know, any inspection of the ballot papers would be merely a roving and fishing inquiry, which is prohibited under section 83(1)(*a*) of the Act.

The Supreme Court in *Dr. Jagjit Singh v. Giani Kartar Singh* (AIR 1966 SC 773), after referring to the entire scheme of the Act and the Rules, has emphasised that the petitioner, who is

a defeated candidate, has ample opportunity to examine the ballot papers before these are counted and in each case, the objection(s) raised by him or his agent having been improperly rejected/overruled. He is well aware precisely the nature of the objection (s) raised by him or on his behalf. He also is in the know of the particulars of the ballot paper(s) to which such objection(s) related. It is in the light of this background that section 83(1) of the Act has to be applied to the petition made for inspection of ballot papers and such petition must contain the concise statement of material facts. The Hon'ble Supreme Court observed :—

> ".....Section 83(1)(*a*) of the Act requires that an election petition shall contain a concise statement of the material facts on which the petitioner relies; and in every case, where a prayer is made by a petitioner for the inspection of the ballot boxes, the Tribunal must enquire whether the application made by the petitioner in that behalf contains a concise statement of the material facts on which he relies. Vague or general allegations that valid votes were improperly rejected, or invalid votes were improperly accepted, would not serve the purpose which S. 83 (1) (*a*) has in mind. An application made for the inspection of ballot boxes must give material facts which would enable the Tribunal to consider whether in the interests of justice, the ballot boxes should be inspected or not. In dealing with this question, the importance of the secrecy of the ballot papers cannot be ignored, and it is always to be borne in mind that the statutory rules framed under the Act are intended to provide adequate safeguard for the examination of the validity or invalidity of votes and for their proper counting....."

Again in *Jitendra Bahadur Singh* v. *krishna Behari*, (AIR 1970 SC 276), it was held by the Hon'ble Apex Court that it is quite easy for the counting agent(s) to note down the serial numbers of the concerned ballot papers. Therefore, if the election petition is silent as to the inspection of ballot papers or whether the counting agent(s) have noted down the serial number of such ballot papers or whether the counting agent(s) raised any objection relating to validity of those ballot papers , if so, who those agents are and what are the serial numbers of the ballot papers to which objections were advanced, the material facts required to be stated are not satisfied and as such scrutiny of ballot papers should not be ordered. It was observed in the following terms:—

> ".....In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis or which he arrived at those figures. His bald asscertion that he got those figures from the counting agents of the congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information. It is not his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition."

The same view was reiterated in *Beli Ram Bhalaik* v. *Jai Behari Lal Kachi* (AIR 1976 SC 283).

In *Chandra Singh v. Ch. Shiv Ram Verma and others* (AIR 1975 SC 403), dealing with the question of recounting of ballot papers, the Supreme Court held that rule 63 of the Rules obligates 'the candidate to state the grounds on which he demands such recount'. It is plain that a mor doubt or small lead or unspecified blemish in the manner of the counting falls short of the needs of the said rule. Under the rule the demand for recount may be rejected if it appears to the Returning Officer to be frivolous or unreasonable. What is not reasonably grounded or seriously supported is unreasonable or frivolous. Suspicions of possible mischief in the process or likely errors in counting always linger in the mind of the defeated candidate when he is shocked by an unexpected

result. The Returning Officer has to be careful, objective and sensitive in assessing the legitimacy of the plea for re-running the course of counting. Victory by a very few votes may certainly be a ground to fear unwriting error in count given other circumstances tending that way. If the counting of the ballots are interfered with by too frequent and flippant recounts by courts a new threat to the certainty of the poll system is introduced through the judicial instrument. Moreover, the secrecy of the ballot which is sacrosanct becomes exposed to deleterious praying if recount of votes is made easy. The best surmise, if it be nothing more than surmise cannot and should not induce the judge to break open ballot boxes. If the lead is relatively little and/or other legal infirmities or factual flaws however around, recount is proper, not otherwise. In short, where the difference is microscopic, the stage is set for a recount given some plus point of clear suspicion or legal lacuna militating against the regularity, accuracy, impartiality or objectivity bearing on the original counting. Of course, even if the difference be more than micropscopic. If there is a serious flaw or travesty of the rules or gross interference a liberal repeat or recount exercise, to check on possible mistake is a fair exercise of power. To tarnish the counting staff with bias is easy for any party who divorces means from ends. When the challenger belongs to the party in power a heavy strain is thrown on the strength of the moral fibre of the election staff whose fearless integrity is a guarantee of purity of the whole process but whose fortunes, before and after elections, may be case with a political government whose key men may sometimes take disturbingly keen interest in the outcome of elections and election petitions. The Court should be reluctant to lend quick credence to the mud of partiality slung at counting officials by desperate and defeated candidates although what is more important is the survival of the very democratic institutions on which our way of life depends.

Again in *S. Baldev Singh* V. *Teja Singh Swatantra (Dead) and other* (AIR 1975 SC 693), while frowning upon the frivolous and unreasonable refusals of recount by the Returning Officers, who forget the mandate of Rule 63 of the Rules that allowance of recount is not an exception and refusal is restricted to cases where the demand itself is frivolous or unreasonable, has held that a judicial recount is not a matter of right. Though judicial power to direct inspection and recount is undoubted, such Power is to be exercised sparingly. It was further observed:—

> ".....Election petitions come to court after a month and a half and ripen for trial months later and then the appeal, statutorily vested, inevitably follows. In this operation litigation which is necessarily protracted, liberal recount or lax re-inspection of votes may create belated uncertainties, false hopes and a hovering sense of suspense, long after elections are over, governments formed and legislatures begin to function. Moreover, while a recount, within the counting station, with the entire machinery familiar with the process still available at hand and operational, is one thing, a reinspection and recount, which is an elaborate undertaking with mechanics and machinery of a specialised nature and which cannot be judicially brought into existence without an amount of time, toil and expense, is a different thing. This Court has laid down clear principles on the subject, meeting the ends of justice, but without opening the flood-gate of recounts on flimsy grounds. Less election litigation is a sign of the people's adult franchise maturity and adventurist election petitions are an infantile disease to be suppressed. Our view of Rule 63, the relevant wholesome instructions by the Commission and the rulings of this Court, harmonise with the overall considerations of law and democracy."

The Hon'ble Supreme Court in *Suresh Prasad Yadav* V. *Jai Prakash Mishra and others*, (AIR 1975 SC 376), while summarising the entire case law, has catalogued the following circumstances under which a recount can be ordered:—

> "Before dealing with these contentions, we may recall, what this Court has repeatedly said that an order for inspection and recount of the ballot papers cannot be made as a matter of course. The reason is two fold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules

provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against trickery, mistakes and fraud in counting, that it can be called almost fool-proof. Although no hard and fast rule can be laid down, yet the broad guidelines, as discernible from the decisions of this Court may be indicated thus.

The Court would be justified in ordering a recount of the ballot papers, only where:--

(1) The election -petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) On the basis of evidence adduced such allegations are *prima facie* established affording a good ground for beleiving that there has been a mistake in counting; and

(3) The Court trying the petition is *prima facie* satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

Again in *Bhabhi* V. *Sheo Govind and others* (AIR 1975 SC 2117), while reiterating the above principles, it was held that the following conditions are imperative before a court can grant inspection, or for that matter sample inspection of the ballot papers:—

"(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The court must be *prima facie* satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount ;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties ;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to injdulge in a roving inquiry with a view to fish materials for declaring the election to be void ; and

(6) That on the special facts of a given case sample inspection may be ordered to land further assurance to the *prima facie* satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.

If all these circumstances enter into the mind of the Judge and he is satisfied that these conditions are fulfilled in a given case, the exercise of the discretion would undoubtedly be proper."

The above ratio was further approved in *N. Narayanan* V. *S. Semmalai and others*, (AIR 1980 SC 206)

At this stage it would not be out of place to quote here the observations made bv the Hon'ble Suprme Court in *Azahar Hussain* V. *Rajiv Gandhi* (AIR 1986 SC 1253):

"In a democratic polity ' lection' is the mechanism devised to mirror the true wishes and the will of the people in the matter of choosing their political managers and their representatives who are supposed to echo their views and represent their interest in the legislature. The results of the Election are subject to judicial scrutiny and control only with an eye on two ends. First, to ascertain that the 'true will' of the people is reflected in the results and second, to secure that only the persons who are eligible and qualified under the Constitution obtain the representation. In order that the 'true will' is ascertained the Courts will step in to protect and safeguard the purety of Elections, for, if corrupt practices have influenced the result, or the electorate has been a victim of fraud or deception or compulsion on any essential matter, the wi'l of the people as recorded in their votes is not the 'free' and 'true' will exercised intelligently by deliberate choice. It is not the will of the people in the true sense at all. And the Courts would, therefore, it stands to reason, be justified in setting aside the election in accordance with law if the corrupt practices are established. So also when the essential qualifications for eligibility demanded by the constitutional requirements are not fulfilled, the fact that the success successful candidate is the true choice of the people is a consideration which is totally irrelevant notwithstanding the fact that it would be virtually impossible to reenact the elections and reascertain the wishes of the people at the fresh election the time scenario having changed. And also notwithstanding the fact that elections involve considerable expenditure of public revenue (not to speak of private funds) and result in loss of public time and accordingly there would be good reason for not setting at naught the election which reflects the true will of the people lightly. In matters of election the will of the people must prevail and Court s would be understandably extremely slow to set at naught the will of the people truely and freely exercised. If Courts were to do otherwise, the Courts would be pitting their will against the will of the people, or countermanding the choice of the people without any object, aim or purpose. But where corrupt practices are established the result of the election does not echo the true voice of the people. The Courts would not then be deterred by the aforesaid considerations which in the corruption-scenario lose relevance. Such would be the approach of the Court in an election matter where corrupt practice is established. But what should happen when the material facts and particulars of the alleged corrupt practices are not furnished and the petition does not disclose a cause of action which the returned candidate can under law be called upon to answer ? The High Court has given the answer that it must be summarily dismissed."

In *Sasanagouda V Dr. S. B Amarkhed and others*, (AIR 1992 SC 1163), the Hon'ble Supreme Court has held that the Court shall not permit a roving enquiry to enable the defeated candidate to have access to the ballot papers to fish out the grounds.

In the present case a bare reading of the averments made in para 11 of the petition shows that there is total lack of material facts. Ballot paper numbers are not mentioned. Neither the precise objection with respect to each of such ballot papers have been stated. Apart from giving certain figures of the ballot papers, whether true or imaginary the petitioner has not disclosed any source or material on which he has arrived at those figures. The assertions made are bald. Thus, in the absence of material facts required to be stated, there is non impleadment of the basic requirement, namely, concise statement of material facts which is *sine qua non* to an election petition.

The petitioner, in para 12 of his petition, has averred that a total of 160 postal ballots were counted out of which 30 were declared invalid. Twenty were said to have been polled in his favour and 94 postal ballots were found to have been polled in favour of the respondent No. 1. It was pleaded that the declaration in respect of 15 to 20 postal ballots were not duly signed/ attested by the competent authority. Besides, 4 or 5 postal ballots were not found in cover. All these postal ballots, which were liable to be rejected, were wrongly accepted and counted in favour of respondent No. 1. It was also pleaded that about 20 to 30 postal ballots were received

at the time the counting was in progress. These ballots too which were liable to be rejected, were wrongly accepted and counted in favour of respondent No. 1 in violation of the rules and instructions of the Election Commission of India. As a result the election of respondent No. 1 has been materially affected.

The averments made in para 12 of the petition also lack in material particulars inasmuch as the necessary particulars, such as, serial number of these postal ballots have not been mentioned. In order to make out a case for recount, the petitioner was required to state :

(*a*) the serial numbers of the postal ballots in respect of which the declarations were not duly signed/ attested by the competent authority ;

(*b*) the serial numbers of the postal ballots which were not found in cover ; and

(*c*) the serial number of the postal ballots which are alleged to have been received after the stipulated date.

In addition to the above, the petitioner was also required to state the source of his information and the material on the basis of which he was arrived at such figures. Besides, he was also required to state the precise objection raised by him or his agent in respect of each such postal ballots.

It is significant to note that on the completion of the counting of votes on 3-3-1998, the petitioner made an application (Annexure P/5) for the recounting of votes in the following terms:—

"Respectfully it is submitted that I am the contesting candidate for 33—Kutlehar Assembly Constituency on the ticket of Indian National Congress. The margin of the votes is very less and I am having doubt in the counting of votes on the part of the counting staff and am also not satisfied with the procedure/process of the counting and, therefore, re-counting of the votes is very much necessary to arrive at a specific point.

It is, therefore, prayed that re-counting of the votes may kindly be ordered in the interest of justice."

The Returning Officer after hearing the parties on 3-3-1998, rejected the application made by the petitioner on the following reasoning:—

"Shri Mohinder Paul contesting candidate of Indian National Congress for 33—Kutlehar Assembly Constituency has submitted an application for recount of votes alleging the doubts on the counting staff deputed for the purpose and has further alleged that counting procedure/process is not satisfactory. The application was considered and I have arrived to the conclusion that the allegations as levelled upon the counting staff is not genuine as the objection has been raised at a later stage when counting was over. If he could have any such type of suspicion on the counting staff so deputed he should have raised this objection at the preliminary stage when the counting was started. As far as the question regarding unsatisfactory procedure/ process of counting is concerned, the counting is being carried on in accordance with intructions of the Election Commission of India. Hence, in view of the facts stated above the request for re-counting of votes is hereby rejected and result of the counting will be announced after the receipt of directions from the Commission accordingly."

In *Satyanarain Dudhani* v. *Uday Kumar Singh and others*(AIR 1993 SC 367), the election petitioner after the completion of counting had prayed for the recounting of votes by making an application to the Returning Officer in the following terms:—

"Inspite of objection raised by our representatives, votes in our favour were either rejected or they were counted in favour of the opposite party. Therefore, it is requested that votes may be recounted."

The request was rejected by the Returning Officer. The High Court of Patna allowed the recount. On appeal, the Hon'ble Supreme Court, while holding that the High Court was not justified in ordering recount and allowing inspection of the ballot papers, observed:—

"It is thus obvious that neither during the counting nor on the completion of the counting there was any valid ground available for the recount of the ballot papers. A cryptic application claiming recount was made by the petitioner-respondent before the Returning Officer. No details of any kind were given in the said application. Not even a single instance showing any irregularity or illegality in the counting was brought to the notice of the returning Officer. We are of the view when there was no contemporaneous evidence to show any irregularity or illegality in the counting. Ordinarily, it would not be proper to order recount on the basis of bare allegations in the election petition. We have been taken through the pleadings in the election petition. We are satisfied that the grounds urged in the election petition do not justify for ordering recount and allowing inspection of the ballot papers. It is settled proposition of law that the secretary of the ballot papers cannot be permitted to be tinkered lightly. An order of recount cannot be granted as a matter of course. The secrecy of the ballot papers has to be maintained and only when the High Court is satisfied on the basis of material facts pleaded in the petition and supported by the contemporaneous evidence that the recount can be ordered

As stated above only three line objection application was filed before the Returning Officer. No objection whatsoever was raised during the counting and no irregularity or illegality was brought to the notice of the Returning Officer. Even the material in the election petition has been pleaded with the object of having a fishing enquiry and does not inspire confidence."

Similarly in *Beli Ram Bhalaik's* case (*supra*), in the application made to the Returning Officer for recounting of votes, no irregularity or illegality, whatever in counting was mentioned All that was stated therein was that the election petitioner was not satisfied with the counting and therefore, wanted a recount. The application did not contain any ground on which a recount was sought, and as such, did not comply with the mandatory requirement of rule 63(2) of the Rules, which provides that after the announcement of the result of counting, a candidate, or in his absence his election agent or any of his counting agents may apply in writing to the Returning Officer to recount the votes either wholly or in part stating the grounds on which he demands such recount.

It was held that such an application was not proper and was liable to be rejected summarily under rule 63(3) of the Rules. The court observed :—

".....A whimsical and bald statement of the candidate that he is not satisfied with the counting, is not tantamount to a statement of the 'grounds' within the contemplation or Rule 63(2). The application was thus not a proper application in the eye of law. It was not supplemented even by an antecedent or contemporaneous oral statement of the author or any of his agents with regard to any irregularities in the counting. It was liable to be rejected summarily under sub-rule (3) of Rule 63, also.....Although no caste iron rule of universal application can be or has been laid down, yet from a beadroll of the decisions of this Court, two broad guidelines are discernible that the Court would be justified in ordering a recount or permitting inspection of the ballot papers only where (*i*) all the material facts on which the allegations of irregularity or illegality in counting are founded , are pleaded adequately

in the election petition, and (*ii*) the Court/Tribunal trying the petition is *prima facie* satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties."

The above principle was again reiterated in *N. Narayanan's* case (*supra*).

In the present case also while making the application dated 3-3-1998 (Annexure P/5) the petitioner has merely stated "the margin of votes is very less and I am having doubts in the counting of votes on the part of counting staff and am also not satisfied with the procedure/ process of the counting....." The application does not contain the grounds on which the recount was demanded. It contains only a whimsical and bald statement of the petitioner that he is not satisfied with the counting. This does not tantamount to a statement of the "grounds" within the contemplation of rule 63(2) of the Rules. The application was thus rightly rejected by the Returning Officer.

There is no denying that the petitioner can challenge the election of respondent No. 1 on all possible grounds and he is not to confine to the grounds raised in the application for recount made to the Returning Officer. However, the grounds raised in the application made to the Returning Officer would go a long way to show as to whether the prayer for recount is well based or not. As stated above, in the application (Annexure P/5) no grounds for recount have been given. Therefore, even on this ground the petition is bad since it lacks material facts and particulars as envisaged by Section 83(1) of the Act and even if the facts mentioned in the petition are taken as correct, no roving and fishing enquiry can be ordered. The absence of grounds for recount in the application made to the Returning Officer, clearly shows that the allegations made in paras 10 to 13 of the petition are clearly an afterthought.

Much reliance was placed by the learned counsel for the petitioner on an observation made by Hon'ble Krishna Iyer J. in *Baldev Singh's* case (*Supra*) that where the margin of difference is minimal, the claim for recount cannot be summarily brushed aside. It was contended that since the margin of difference in the present case is only three votes, a recount is required to be ordered.

The above observations were considered by the Hon'ble Supreme Court in the case of *N. Narayanan* (*Supra*) and it was observed:—

> ".....In the first place, this observation was really meant for the Returning Officer because at the time when request for recount to the Returning Officer is made the electoral process is still continuing and if there are any counting errors they can be rectified before the election process is complete. This however cannot apply to the Court while dealing with an election petition because if a recount is ordered at that stage then the electoral process has to be restarted afresh. In our country the election is an extremely expensive process and unless very clear case for recount is made out the candidates should not be put to unnecessary trouble and expense....."

In so far as the allegations made against the counting staff are concerned, suffice to say that had there been any manipulation by the counting staff and/or had there been any partial attitude on their part towards the petitioner, the matter would have been brought to the notice of the Returning Officer by the petitioner or his agent(s) and reference to it would have been made in the application, Annexure P/5. The petitioner appear to have remained silent and he never raised any such objection. On similar facts and in similar circumstances, it was held in *Balev Singh's* case (*supra*) that silence on the part of the petitioner really silences the grievance.

Though in *Raghbir Singh Gill* V. *Gurcharan Singh Tohra and others* (AIR 1980 SC 1362) and in *A. Neelalohithadasan Nadar* V. *George Mascrene and others*, [1994 Supp. (2) Supreme

Court Cases 619] , it has been held that "secrecy of ballot" cannot be used to suppress a wrong coming to light and to protect a fraud on the election process or to defend a crime *viz.* forgery of ballot papers etc. and that the principle of secrecy of ballot will have to yield to the larger principle of purity of election for ensuring free and fair election, it is pertinent to note that the principle that recount cannot be ordered just for the asking without making out a specific case therefor, was reiterated and it was held that the discretion of recount should not be exercised in the manner so as to enable the election petitioner to indulge in a fishing and roving inquiry.

Yet another averment has been made in para 21of the petition to the following effect:—

> "That a perusal of form 20-A (Annexure P/2) reveals that 2 votes in Polling Station No. 10 and 78 (1 each) were shown as tendered votes. It may pertinently be added here that one more vote was also tendered in Polling Station No. 76 but the same has not been reflected in Form 20-A (Annexure P/2). However, a perusal of form 16-A (certified copy of which is added herewith as Annexure P/6) clearly reveals that one more vote has also been tendered at Polling Station No. 76. The above submissions clearly prove that in all there were 3 tendered votes and the margin of victory of respondent No. 1 was by 3 votes. In view of this, these three tendered votes ought to have been counted in the prevailing situation. Non-counting of these 3 tendered votes has also materially effected the result of election of respondent No. 1 (returned candidate). Besides inspection of these three tendered votes in the given circumstances also deserves to granted, which may be allowed."

The above averments lack in material particulars within the meaning of Section 83(1) of the Act inasmuch as the petitioner has not given the names of the persons who had cast such tendered votes. Nor there are averments that the persons who had cast the initial votes as voters on particular serial numbers in the electoral rolls were someone other than the genuine voters mentioned at that serial numbers and that the tendered votes which were marked were the genuine voters.

Moreover though the petitioner alongwith his petition has annexed a copy of form 16-A in respect of polling station No. 76, he has not annexed copies of similar forms in respect of polling stations No. 10 and 78 in order to show if any tendered vote was marked at such two polling stations. In the absence of the copy of such form No. 16-A especially in respect of polling station No. 78, there is a possibility that an accidental or clerical error might have crept in while preparing the statement in form No. 20-A (Annexure P/2).

Since the averments made in para 21 also lack in material particulars, the petitioner has not been able to make out a reasonable cause of action.

The learned counsel for the petitioner lastly has placed reliance on the decision of the Supreme Court in *Ashwani Kumar Sharma* V. *Yaduvansh Singh and others* [(1998)1 SCC 416)], wherein it has been held that the petition is required to contain a concise statement of material facts, this being equivalent to a cause of action and that the entire evidence in support of such material facts is not required to be set out.

It is significant to note that in this case also the Hon'ble Supreme Court has reiterated its earlier decisions that the election petition must contain a concise statement of material facts and that failure to plead even a single material fact would lead to incomplete cause of action and incomplete allegations of such a charge are liable to be struck off.

What are mateiral facts, would depend upon the facts of each case.

In the case relied upon by the learned counsel for the petitioner, the election pettitioner therein after pleaded that 3530 votes which should have been counted in his favour were

wrongly counted in favour of respondent, referred to the contemporaneous written complaints lodged by him in this connection. He also gave detailed Tables showing the wrong counting of votes cast in his favour which were counted as the votes of respondent. The number of such votes so counted were set out separately in a tebular form in detail. It was on these facts that the Hon'ble Supreme Court came to the conclusion that all necessary and material facts stood pleaded.

The ratio of the said case is not applicable to the facts of the present case.

In view of the foregoing discussion, it is held that the pleadings contained in the petition lack in material particulars as required under Section 83 of the Act and that such pleadings do not furnish a cause of action. The issue is accordingly decided in favour of respondent No. 1 and against the petitioner.

Relief :

As a result of the above findings recorded under Issue No. 1 , the present petition fails and the same is accordingly dismissed at the preliminary stage with costs quantified at Rs. 3000/-.

The Registry shall communicate the decision of the present petition to the Election Commission of India and the Speaker of the Himachal Pradesh Vidhan Sabha by sending an authenticated copy of the judgment in accordance with the provisions contained in section 103 of the Act.

E.M.P. No. 1 of 1998 ;

Dismissed as having become infructuous in view of the order passed in the main election petition.

E.M.P. No. 2 of 1998 :

The record ordered to be summoned *vide* order dated 6-5-1998 from the District Election Officer, Una, if already received , be returned forthwith.

E.M.P. No. 7 of 1998 :

Infructuous in view of the order passed in the main election petition.

E.M.P. No. 9 of 1998 :

Infructuous in view of the order passed in the main election petition.

Sd/-
R. L. KHURANA,
Judge.

June 24, 1998.

Seal.

ATTESTED
Sd/-
Superintendent (Judicial),
High Court of H. P.,
Shimla.

By order,
K. R. PRASAD,
Secretary,
Election Commission of India.